

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ERNESTO ORTIZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NIES CONSTRUCTION, INC.</b>	)	Docket No. 199,812
Respondent	)	
AND	)	
	)	
<b>CNA INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant asked the Appeals Board to review the March 17, 1997, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on August 8, 1997, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Steven Marsh of Wichita, Kansas. There were no other appearances.

**RECORD**

The Appeals Board considered the record listed in the Award. Additionally, the parties stipulated that the evidentiary deposition of Clayton Ford, respondent's general manager, taken on behalf of the respondent on September 23, 1996, should be made part of the record before the Appeals Board.

**STIPULATIONS**

The Appeals Board adopted the stipulations listed in the Award.

**ISSUES**

The nature and extent of claimant's disability is the issue for review before the Appeals Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The essential facts of this case are not in dispute. The Administrative Law Judge limited claimant to permanent partial disability benefits based on a stipulated 8 percent permanent functional impairment rating to the whole body. Claimant contends he is eligible for a work disability and, therefore, should not have been limited to permanent partial disability benefits based on the functional impairment rating. For reasons more fully developed below, the Appeals Board affirms the Award of the Administrative Law Judge.

Claimant started working for the respondent as a laborer in February 1993. He initially injured his low back while lifting forms on November 7, 1994. Claimant testified he received conservative medical treatment provided by the respondent through a number of doctors over the next several months. However, claimant's back condition worsened to the point he was taken off work on March 23, 1995. Finally, claimant was referred to Dr. Paul S. Stein, M.D., a neurosurgeon in Wichita, Kansas, for examination and treatment.

Dr. Stein diagnosed a herniated disc at L4-L5 and performed a microdiscectomy on June 26, 1995. Claimant remained off work until he was released by Dr. Stein on October 18, 1995, to return to work with permanent restrictions. Respondent returned claimant to light-duty work at a comparable wage on October 25, 1995. Thereafter, the respondent, because of lack of work, laid claimant off along with eight or ten other workers on November 13, 1995.

Claimant then made application for state unemployment benefits. The respondent received a decision from the Kansas Department of Human Resources, Unemployment Division, dated January 5, 1996, that denied claimant unemployment benefits because claimant was not a United States citizen and further was not authorized to work in the United States. Claimant admitted during his regular hearing testimony that he was an illegal alien and had presented respondent with a falsified green card and social security card when he initially applied for employment.

The respondent established through the testimony of Clayton Ford, general manager, that the workers, who were laid off with claimant in the Fall of 1995, were all given the opportunity to return to work for the respondent at a comparable wage in the Spring of 1996. The only exception was the claimant, who was not contacted by the respondent because he was an illegal alien and it was a violation of federal law to employ an illegal alien.

Claimant asserts, regardless of his illegal status, that he remains eligible under the provisions of the Workers Compensation Act for a work disability award. Claimant argues he has not voluntarily refused employment nor has he voluntarily or intentionally removed himself from the open labor market. Furthermore, claimant makes the argument that the respondent continues to employ illegal aliens. Claimant asserts that respondent had the legal obligation at the time claimant was hired to confirm whether or not he was legally in this country and employable. Claimant argues he is entitled to a work disability award of 95 percent based on the evidence in the record.

Respondent requests that the Appeals Board affirm the decision of the Administrative Law Judge that limited claimant to an award based on the functional impairment of 8 percent. The Administrative Law Judge found that claimant was not eligible to return to work for the respondent or any other employer in the United States. Therefore, she found that "to award claimant a work disability under these circumstances would be a violation of public policy" and cited the case of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), as authority for this finding.

The Appeals Board agrees with the Administrative Law Judge's Award and the arguments presented by the respondent. The record is clear and uncontradicted that if claimant would have had a legal status, the respondent would have returned him to work at a comparable wage in the Spring of 1996. Although the facts of this case are not analogous to the facts in the Foulk case, the Appeals Board finds the same policy considerations apply. The Court of Appeals in Foulk refused to reward a worker who refused to accept a position within the workers capabilities at a comparable wage. Here, the Appeals Board concludes claimant's illegal status should not be a benefit to him and a burden on his former employer. Accordingly, the Appeals Board finds that a comparable wage should be imputed to the claimant and as provided by K.S.A. 44-510e, claimant is limited to the percentage of his functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated March 17, 1997, should be, and is hereby, affirmed.

All remaining orders contained in the Award of the Administrative Law Judge are approved and adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

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c: Robert R. Lee, Wichita, KS  
D. Steven Marsh, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director